

# **Reflections of a Career Prosecutor on Effectively Addressing the Illegal Drug Problem in America**

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I have heard it said that we will never be able to arrest our way out of the illegal drug problem in America. I believe it is more accurate to say that we will never incarcerate our way out of this pervasive problem that has long plagued our nation's urban cities and, with the rapidly growing spread of methamphetamine, now threatens rural and suburban communities as well. That is not to say that incarceration is not important or necessary when dealing with drug offenders. Lengthy incarceration for drug dealers and manufacturers is important to protecting the safety of our communities, as is the threat of incarceration for the much larger numbers of individuals more accurately classified as drug abusers. To be sure, the complex nature of this problem, which is the primary driving force behind a large proportion of crime in our country, cannot be adequately addressed by single-focused approaches such as either of those mentioned above. The long-term solution, in the opinion of this career prosecutor, rests in a combined strategy of increased enforcement (more arrests and prosecutions), effective use of scarce jail and prison space, innovative judicial intervention (through the establishment of drug courts and alternative sanctions), more effective treatment strategies and, perhaps most importantly of all, an increased emphasis on prevention.

Like many in our nation, I am now watching the scourge of methamphetamine sweep across America from west coast to east. It has arrived over the last three years with a vengeance in the jurisdiction I have been privileged to serve the past 18 years as the Dakota County Attorney. Dakota County, Minnesota is a rapidly growing suburban community in the southeast metro area of the Twin Cities. It is now our state's third largest county with 385,000 citizens, representing about 7-1/2% of our state's total population. Yet over the last three years we have had between 14-15% of our state's total arrests for methamphetamine. In 2004, methamphetamine-related prosecutions initiated by my office rose to 446 out of a total of 1,866 adult felony cases charged. That's 24% of all the serious crimes charged by my office last year, up dramatically from the three dozen methamphetamine-related crimes we prosecuted a decade earlier. Combined with all other illegal controlled substances, drug prosecutions comprised 44% of my entire criminal caseload last year – and this figure only takes into consideration offenses involving the possession, sale or manufacture of these illegal drugs. It does not include the thefts, burglaries, robberies, child abuse/neglect, rapes and murders (among other crimes) associated with the illegal drug trade that we prosecute each year. I estimate that the illegal drug trade, directly or indirectly, is involved in 60-65% of all crime occurring in my jurisdiction. I know that other jurisdictions across America are experiencing similar devastating impacts from the sale and use of illegal drugs.

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Unlike the crack cocaine epidemic that swept through the urban centers of this country in the 1980's (and still plagues us to a significant extent in America's major cities today), methamphetamine represents a new and different threat. Its primary impact has been felt (at least initially) in rural and suburban communities, where use of illegal drugs, while always a concern, has not traditionally been our number one problem. It is today. Another distinguishing and important characteristic of methamphetamine is that it afflicts far more women and non-minorities than other hardcore drugs like cocaine, crack and heroin. Methamphetamine has been labeled the most dangerous drug in America<sup>1</sup>, and it may well be – at least it easily lends itself to that conclusion given its rapid rise in use across many parts of America.

Others would argue that marijuana is America's most dangerous illegal drug (alcohol remains our most abused chemical substance). This is because almost all users of methamphetamine and other illegal drugs started their spiral toward addiction by smoking marijuana. It is not the harmless substance that some would have us believe. Marijuana is the most widely used illicit drug in America. It poses significant health risks to users and others. Marijuana is an addictive drug which can result in long-term dependence.<sup>2</sup> Perhaps most importantly of all, it is the drug of initiation for the vast majority of illegal drug users in America.

Regardless of which illegal drug is labeled America's most dangerous, the simple and indisputable fact is that the sale and use of illegal drugs are the driving forces behind the crime rate, not only in my suburban Twin Cities community, but across this country – and our nation's criminal justice system is struggling to keep up. The changing dynamics of the methamphetamine epidemic, which has resulted in greater drug use by women and non-minorities in rural and suburban areas, only exacerbates this pervasive problem. We will face even greater devastation if methamphetamine takes root in our nation's major urban cities. If this occurs with the same level of impact that methamphetamine has had elsewhere in our county, the crack cocaine epidemic of the 1980's will be pale in comparison. The devastating impact of illegal drugs in America is enormous. Those working in our nation's criminal justice system and our elected policymakers, from county commissioners to state legislators to members of Congress, are looking for solutions. I am no different.

I have for many years followed a philosophy of aggressive prosecution of illegal drugs in my community. My office pursues with vigor prosecutions of all cases involving controlled substances, including those offenders possessing only "trace" amounts of illegal drugs.<sup>3</sup> No amount of methamphetamine, cocaine, crack, heroin or other illegal drug (except marijuana) is too small for us to initiate a felony charge.

I have been criticized by a few policymakers, public defenders and judges for needlessly filling up the beds in our County jail, which are in short supply, with low-level drug offenders. Some believe these scarce jail beds should be reserved for more serious criminal offenders. Our criminal justice system is often criticized for being too tough on persons who really aren't criminals at all, but who actually suffer from the disease of addiction.

Have I been wrong in following this aggressive prosecution approach? Are we really too tough on drug offenders in America? I think not – for I believe that society should not establish laws and then fail to enforce them. If we indirectly leave persons with the impression that it's really no big deal to break a particular law, what kind of message are we sending? Let's face it, we give too many conflicting messages to our kids as it is these days. Laws exist to protect us all, and if we

choose to enforce them discriminately without valid reason, our system of equal justice for all will soon begin to crumble little by little. This is not to say that prosecutors and judges should be stripped of their discretion to differentiate between individual cases. Valid nondiscriminatory reasons based upon factual or evidentiary issues may cause two similar cases to result in different but justifiable outcomes.

I hope those who read this article do not misinterpret what I am saying. I do not advocate locking up persons for every crime occurring in America, no matter how small. A consequence of some sort, however, is warranted when someone breaks the law. I have long been a supporter of alternative sanctions for lower level offenders – sanctions like community work service, fines and diversion programs are certainly appropriate and warranted for many low-level criminal offenses. No response at all, however, is not an appropriate answer. The lack of adequate sanctions for criminal behavior will in the long run only make our problems with crime in this country more difficult to address.

I firmly believe in the importance of graduated sanctions – i.e., increasing penalties for repeated and escalating criminal behavior. While this is not only logical and consistent with common sense, it is important to keep in mind that to be truly effective, graduated sanctions need to be applied with consistency and persistence. It is no deterrent, for example, for a parent to tell a teenager to be home before the curfew or the teen will be grounded, and then to do nothing if the deadline is not kept (absent, of course, some understandable and legitimate excuse). In fact, I believe you may do far more damage by imposing the deadline and threat of consequences in the first place if the consequences are not enforced after a violation of the rules has been established. By failing to do so, in the example above, a parent is telling their child that boundaries aren't really boundaries and rules are meant to be broken. What can we expect from our children if these are the lessons we teach them? We should expect kids who have little or no respect for rules of conduct and no understanding of what the limits of their behavior should be. The same is true of criminals.

I believe that one of the biggest shortcomings of our nation's criminal justice system is the failure to consistently impose adequate and graduated sanctions for low-level criminal behavior. When it takes up to 13 thefts of \$2,500 or less before a Minnesota thief spends a day in state prison,<sup>4</sup> should we be surprised that these offenders don't think about the consequence of what they are doing and continue to steal? I think not. While the same holds true of those who use illegal drugs (it takes up to 13 low-level felony drug convictions before a person will receive prison time in Minnesota)<sup>5</sup>, there is one very important distinction: use and abuse of illegal drugs are among the most dangerous and destructive behaviors that could ever impact an individual. Using an illegal drug is a serious crime that adversely affects the entire community.

Let's look at marijuana in this context for a moment. Some would argue that using marijuana is a victimless crime which is really no big deal. In fact, Minnesota's law perpetuates this myth, when it classifies the possession of a small amount of marijuana as a petty misdemeanor, which is not even considered to be a crime.<sup>6</sup> This is wrong and it needs to change. We should not fool ourselves for one minute that smoking a joint is a victimless and harmless crime. Smoking marijuana weakens the immune system, increases the risk of cancer and leads to brain changes that reduce alertness, perception, coordination and reaction time. The latter impact impairs judgment and the ability to drive safely, leading to hundreds of car crashes every year, directly affecting the safety of law-abiding citizens in our nation. More than 200,000 persons enter treatment programs annually in America, primarily for marijuana dependence, representing about 62% of all illegal drug treatment

in our nation.<sup>7</sup> Using marijuana is a start for many towards a life which could well involve the use of other more dangerous illegal drugs. Marijuana use provides a significant part of the “demand” side of the economic equation that brings drug dealers onto our street corners and into our schools – drug dealers who bring with them other crimes and violence.

We would be wise as a society not to underestimate the destructive nature of marijuana. It is the gateway drug to other controlled substance abuse. People using marijuana are eight times more likely to have used cocaine, 15 times more likely to have used heroin and five times more likely to develop a need for treatment of abuse or dependence on any drug.<sup>8</sup> The simple fact of the matter is that most persons who use cocaine, crack, methamphetamine or heroin started by smoking marijuana. Most persons addicted to these hard-core drugs, especially cocaine and methamphetamine, are poly drug users (meaning they are abusers of multiple illegal drugs and alcohol). Use and abuse of multiple illegal drugs and alcohol not only makes the users a danger to themselves, but poses substantial risk to others. Driving under the influence of drugs or alcohol kills or cripples more people each year than any other crime in America. Use and abuse of drugs and alcohol substantially increases the risk of domestic violence and child abuse. These are not victimless crimes and we should never forget it.

The answer to our problems with illegal drugs in America does not lie in decriminalizing marijuana and other controlled substances, as some would like us to believe. As the argument goes, if you decriminalize illegal drugs, you take the profit incentive away from the drug dealers and the gangs and violence in America’s cities will be greatly reduced. In my view, such a belief is clearly unfounded. Legalizing any illegal drug, including marijuana, will drastically increase the number of addicted persons in this country, multiplying by leaps and bounds the problems we already face in our society from the use and abuse of chemicals, such as increased domestic violence and child abuse, impaired driving, suicide, and drug-induced paranoia and violence. The increased drug use that legalization of controlled substances would bring, and the corresponding public health and societal costs from such a policy change, would dramatically increase the problem, not solve it. Also, if history tells us anything, there will always be criminal gangs operating in this country selling some illegal product and/or otherwise preying upon the innocent and helpless. Legalizing controlled substances, including marijuana, is clearly not a solution to the illegal drug problem in America, nor is it worthy of any serious consideration whatsoever.

As noted above, the sale and use of illegal drugs is the single biggest factor driving the crime rate in this country. We cannot afford to ignore those who are using these illegal and dangerous substances. We have to address this problem head on with aggressiveness and with a comprehensive and cohesive strategy. Before I discuss what that strategy should be, let me address a few other points. First, I would like to respond to the criticism I referenced earlier that it is wrong to punish the disease of addiction. Yes, it is fair to say that addiction is the medical root of drug and chemical abuse problems in America and that addiction is a disease, which can and must be treated. It does not follow, however, that those who become addicted to illegal drugs should not be punished for their criminal behavior. Consistently and fairly applied graduated sanctions, in fact, provide an important incentive for drug users to seek and complete the treatment they need to effectively address their addiction.

While not confined solely to drug cases, I would like to digress briefly to discuss another issue of importance. As prosecutors we have to guard against the temptation to succumb to the pressures of our jobs, often created by too much work done by too few persons in too little time. It is very easy,

given the constant pressures we face every day to push cases through the system, to fall victim to the belief that the current case we are working on just deals with marijuana, that this is just another theft case, that this is not the type of case that warrants or demands much attention. This is especially true in larger prosecutor offices, but can be true in smaller ones as well. Deputy prosecutors can easily fall into this cycle of thinking. I believe one of the important responsibilities of a chief prosecutor is to emphasize to his/her staff the notion that every case is important to someone. Every case has a victim who is concerned about the outcome and who needs to be left with the impression that when all is said and done, justice has been served, that his/her concerns have been listened to, and that the prosecutor actually cared about the outcome that took place. A chief prosecutor should remember that the public's perception of the work we do is often based on how the victims and witnesses feel about their experience in a given case. I try to take time periodically to remind my staff of the need to remember that every case is important to someone.

I might add that this dilemma is not unique to prosecutors. It is true of most every profession. Attention to detail and focus upon customer service most often spell the difference between success and failure of any business venture. In the criminal justice system, it is perhaps the judges themselves who are most prone to fall victim to the easy trap that I call the "no big deal syndrome." Judges (at least in my state) are under extreme pressure to push cases through the system as quickly as possible. How fast they can clear their calendars plays a significant role in the weighted caseload studies prepared by our Supreme Court which help determine when and how many new judgeships are needed.

It is easy to understand how prosecutors and judges can become somewhat callous in their thinking about whether they are really doing justice in the few minutes of time they can devote to a low-level criminal case. It is easy to see how they could question whether what they do really matters. Does the amount of jail time (or the type and extent of an alternative sanction) a judge imposes upon a criminal defendant convicted of a lower level crime really matter in the big picture of things? What's the difference between 30 or 60 days, be it jail time or community service? Does it really matter in the long run? It certainly may not appear to matter much from a bird's eye view of overall public safety in a community, but on closer reflection, I believe it matters a great deal. It matters to the victim of the crime and, perhaps even more importantly, it matters to the offender, though the offender often fails to realize it at the time. If the impression an offender has concerning the prosecutor's decision to charge him or to accept a plea to a lesser crime, or the judge's decision to sentence him, is that these decisions make little or no difference to the professionals making them, how is it ever going to make a difference to him?

This is one reason why I am becoming more convinced (and I must admit that I was somewhat skeptical at first) that drug and other specialty courts<sup>9</sup> hold great promise in addressing specific and troubling criminal caseloads and issues affecting our criminal justice and social services systems. This process, which involves more time in front of the judge, prosecutor and other criminal justice officials, most often leaves the offender with the impression that the professionals in the system really do care about his/her success. What a novel concept this is: a judge and other criminal justice professionals actually taking the time to really talk to an offender and let him or her know that they understand, for example, the pressures their addiction to chemicals places upon them, that they care about the offender's succeeding in treatment and getting a job and back to their family, in the same way that they care about keeping drugs away from children and keeping our communities safe and free from crime.

Hope is too often a fleeting prospect for many non-criminals in our society, especially those suffering from mental health problems. It is virtually non-existent for drug abusers. The chemicals they ingest very quickly re-wire their brains so that they think only of themselves and where that next “hit” of pleasure will come from. If we can restore hope to a drug offender, we can start them on a road to recovery with the realization that their actions have hurt not only themselves, but also their families, their friends and all of the citizens in the communities in which they reside. Drug courts can do this more quickly and more effectively than any other approach I have seen in connection with the criminal justice system’s response to this serious and pervasive problem.

Jurisdictions considering the creation of drug courts must be cautious, however, to focus upon the right cases. Drug courts are resource-intensive and care must be undertaken to carefully screen candidates to identify those most likely to benefit from an intensive drug court intervention. When faced with the choice of a lengthy jail or prison term, most drug offenders will quickly opt for an alternative. Unfortunately, some have no serious intention of changing their lifestyle and are destined for failure despite the opportunities for change that a drug court and its essential treatment component will offer them.

Also, it is important to remember that serious drug offenders, such as those who manufacture or sell illegal drugs for profit, deserve the lengthy prison sentences they receive. So do those who possess large quantities of drugs that are clearly associated with distribution rather than personal use. Such individuals are not appropriate for drug courts, which rightfully tend to focus on rehabilitating drug users and abusers and not punishing drug dealers and manufacturers. As a society, we need to continue to recognize the drug dealers and manufacturers for who they are: a danger to our children and to all of our citizens. These are the individuals who deal in the violence that almost always follows the illegal drug trade and threatens to destroy the basic fabric of safety in our society.

I am fully aware that many drug dealers or manufacturers selling drugs for profit (especially methamphetamine) are users as well, and in need of treatment. These persons, however, should get the treatment they need in prison and not while on the supervised release programs of a drug court. The Minnesota Legislature wisely recognized this concept in 2005 when adopting a bill that lengthened the terms of imprisonment for those who manufacture methamphetamine while at the same time allowing certain drug offenders (those not selling drugs for profit) to earn their way out of prison early by completing treatment.<sup>10</sup> A similar program established by the Minnesota Legislature some years ago (and utilized in many other states as well) created a “challenge incarceration” program (sometimes called “boot camp”), enabling certain non-violent offenders (mostly those sentenced for drug crimes) to earn their way out of prison early by completing an intensive and disciplinary-focused program.<sup>11</sup> Programs such as this are successful in responding to more serious drug offenders where a prison term rather than drug court is appropriate and necessary.

Drug courts also must incorporate and follow the principle of graduated sanctions, including the importance of following through with threatened sanctions, as I discussed earlier. While it can be anticipated that those recovering from a drug addition will relapse on one or more occasions over the course of successful treatment and aftercare, it is very important that appropriate consequences follow each such relapse and that clear limits be conveyed to the offenders. For example, every failed alcohol or drug test should be followed with a consequence, be it community service or a day or two in jail – i.e., graduated sanctions for committing the violation of drug court conditions or committing a new crime.

Faced with the circumstance of relapse, drug court professionals need to convey disappointment, but not disgust, and the importance of the offender's taking the recovery process seriously, in order to avoid prison. When and how much incarceration time they may potentially face should clearly be made known to the offender and when continuing non-compliance reaches the agreed upon limit, the hammer needs to fall – for our response to crime, be it through a drug court or a general calendar proceeding is, after all, about deterrence and leading a law-abiding lifestyle. Consequences must flow from non-compliance with understood expectations. Continued and unabated non-compliance should result in expulsion from the drug court program and imposition of the previous jail or prison term promised. It is important to remember that promises unkept are the bane of effective deterrence.

When looking for long-term solutions to the illegal drug problem in our society, it is also important to remember that persons suffering from drug addictions who need treatment and aftercare can't get into drug court to obtain it without being arrested. Consequently, it is a good thing for police and prosecutors to be aggressive in efforts to identify, apprehend and charge drug offenders. To effectively and appropriately reduce the devastating impact that illegal drugs have upon our society, police and prosecutors must be given adequate resources to do their jobs and so must criminal defense attorneys and judges, along with our partners in corrections and social services.

To effectively aid offenders in overcoming their drug addictions, we must also provide needed resources for treatment and insure that adequate aftercare programs exist to provide necessary options to fall back upon for offenders facing continuing drug cravings. Treatment and aftercare are needed for significant periods of time for most drug addictions. Aftercare in some form of a support system – hopefully from the former drug user's family and friends – may, in fact, be needed for life.

The most effective long-term solution to our illegal drug problems in America may, however, lay in prevention. The best solution to drug use is never to start, or, putting it another way, the best solution to addiction is to never contract the disease in the first place. Unfortunately, in the tight budget times that the federal government and most local and state governments find themselves in today, prevention programs are often the first thing to be cut. They should be the last.

In summary, to most effectively address our problems with illegal drugs, which pose grave dangers in communities all across America, we need to insure that professionals in our entire system of criminal justice have the resources needed to keep up with and effectively address this significant problem, including the establishment and implementation of effective drug courts for appropriate offenders. We also need to insure that adequate jail and prison space exists, for more arrests and more prosecutions will result in more offenders needing appropriate and adequately enforced graduated sanctions. We must also keep in mind that not all offenders are appropriate for a drug court model. Drug dealers and manufacturers selling drugs for profit should be sentenced to prison. Alternative sanctions will have little or no deterrent effect on serious drug offenders who manufacture these dangerous substances and sell them in our communities. The threat of future incarceration and the personal and public humiliation of an arrest and prosecution can, however, have a significant deterrent effect upon many users of illegal drugs who are experimenting with or are addicted to these dangerous substances. With the hope for the future provided by a drug court and effective treatment and aftercare, these lower level criminal offenders may yet be saved.

The soundest approach to dealing with illegal drugs in America is to meet the problem head on with aggressive enforcement of our drug laws, utilizing a graduated sanctions approach through drug courts for appropriate offenders combined with effective treatment and aftercare. By giving police the resources they need to locate and arrest more drug users, giving prosecutors the resources they need to charge and process the cases presented, and giving courts (and other criminal justice professionals involved) the resources they need to establish and operate innovative drug courts with effective treatment and aftercare components, combined with focused and adequately funded prevention efforts, we can effectively reduce the number one problem facing our criminal justice system today. This approach will not only go a long way to reduce the methamphetamine epidemic sweeping across America, it will more effectively address our continuing problems with cocaine, crack, heroin (among other hardcore drugs) and, perhaps most importantly of all, marijuana – the gateway drug so often and so foolishly ignored by our society.

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<sup>1</sup> *Newsweek*, August 8, 2005, p. 41.

<sup>2</sup> Marijuana users have an addiction rate of about 10%, and of the 5.6 million drug users who are suffering from illegal drug dependence or abuse, 62% are dependent on or are abusing marijuana. See *An Open Letter to America's Prosecutors*, from Scott Burns, Deputy Director for State and Local Affairs, White House Drug Policy Office, November 1, 2002.

<sup>3</sup> In Minnesota, the possession of any amount of illegal drug, except marijuana, is a felony. Minn. Stat. § 152.02 and 152.025. See also *State v. Siirila*, 292 Minn. 1, 193 N.W. 2d 467 (1971).

<sup>4</sup> Minnesota Sentencing Guidelines and the Guidelines Grid rank theft of \$500-\$2,500 (Minn. Stat. § 609.52, Subd. 2 (1)) as a Level 2 offense. Since Level 2 offenses only receive ½ of a criminal history point, Minnesota Sentencing Guidelines would not recommend a prison term until the 13<sup>th</sup> such offense (assuming no probation violations or other crimes were committed). Even under Minnesota's career criminal statute (Minn. § 609.1095, Subd. 4), a career criminal would not go to prison until the offender committed the 6<sup>th</sup> felony with all 5 prior convictions having to be sequential in nature, meaning that a conviction and sentence for each offense must have occurred before the next crime is committed. See Minn. Stat. § 609.1095, Subd. 1 (c).

<sup>5</sup> Minn. Stat. § 152.025 (Controlled Substance Crime in the Fifth Degree) is the lowest level felony drug crime in Minnesota. This crime carries only ½ criminal history point for each offense and Minnesota Sentencing Guidelines would not recommend a prison term until the 13<sup>th</sup> such offense occurs (assuming no probation violations or other crimes were committed). See also the discussion of Minnesota's career criminal statute in footnote 4.

<sup>6</sup> Minn. Stat. § 152.027, Subd. 4(a).

<sup>7</sup> DEA Director Asa Hutchinson, *Modernizing Criminal Justice Conference*, London, England (June 18, 2002). See also [www.dea.gov](http://www.dea.gov).

<sup>8</sup> *An Open Letter to America's Prosecutors*, from Scott Burns, Deputy Director for State and Local Affairs, White House Drug Policy Office, November 1, 2002.

<sup>9</sup> In addition to drug courts, other specialty courts such as mental health courts, family dependency courts, DWI courts, etc. have been established in certain jurisdictions across America in recent years. Several Minnesota counties currently have drug courts in operation, and Ramsey County, Minnesota has a DWI court. Mental health courts now number over 100 in America (see *A Guide to Mental Health Court Design and Implementation*, The Council of State Governments, May 2005).

<sup>10</sup> Minn. Stat. § 244.055.

<sup>11</sup> Minn. Stat. § 244.17 - 244.173.